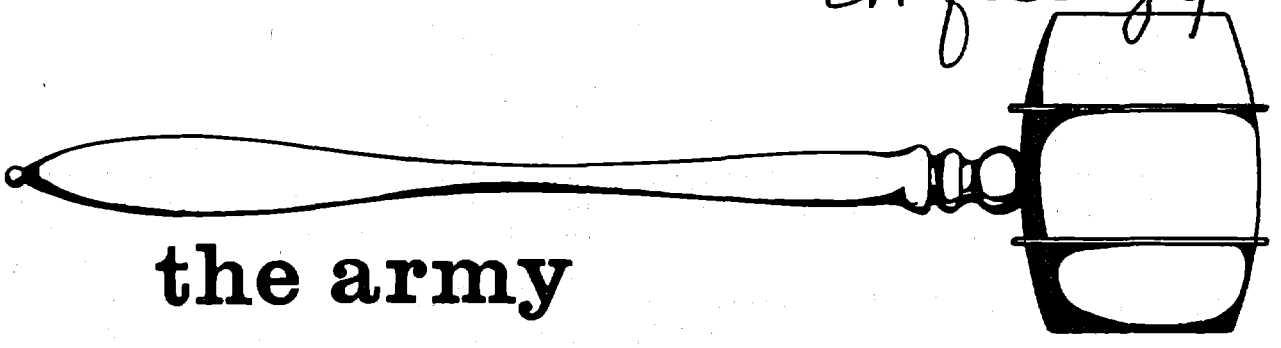
LA file copy



the army LAWYER

HEADQUARTERS, DEPARTMENT OF THE ARMY

Department of the Army Pamphlet
27-50-116

August 1982

Table of Contents

Salvaging the Unsalvable Search: The Doctrine of Inevitable Discovery 1
Interlocking Confessions in Courts-Martial 11
From the Desk of the Sergeant Major 19
CLE News 20
Current Materials of Interest 24

Salvaging the Unsalvable Search: The Doctrine of Inevitable Discovery

Captain Stephen J. Kaczynski
Developments, Doctrine, and Literature Department, TJAGSA

"The first thing we do, let's kill all the lawyers".[1]

The thought noted above has undoubtedly entered the minds of more than a few criminal investigators and commanders when they have had explained to them the law of search and seizure. Eyes have rolled and stomachs have turned when advised that, although probable cause to search had clearly been present, the timing or conduct of the search in question caused its fruits to be inadmissible in court.[2] Recently, however, perhaps reflecting a trend in the federal court system,[3] the Court of Military Appeals has held that, notwithstanding that certain proffered evidence had been found in violation of the fourth amendment, such evidence may be admitted at court-martial if it can be established that this evidence would have been discovered inevitably in the course of lawful police procedures and independently of the

[1] W. Shakespeare, Henry VI, Pt. IV, iii, 86 (W. Craig ed. 1936).

[2] *See* notes 36–40 and accompanying text and note 64, *infra*.

[3] *See* text accompanying notes 43–50, *infra*.

illegal activity.[4] The doctrine of "inevitable discovery" thus gained acceptance in the body of military law.[5]

The Ebb and Flow of the Exclusionary Rule

Since 1914, the gradually expanding scope of the "exclusionary rule" has grated harshly upon law enforcement authorities. In that year, in *Weeks v. United States*,[6] the United States Supreme Court first announced the rule that evidence seized in violation of an accused's fourth amendment rights could not, over his objection, be introduced into evidence.[7] In *Silverthorn Lumber Co., Inc. v. United States*,[8] the Court enlarged the rule to exclude from evidence any information gained as a consequence of the illegal action.[9] Finally, in *Wong Sun v. United States*,[10] the Court indicated that it

[4] United States v. Kozak, 12 M.J. 389 (C.M.A. 1982).

[5] *See* notes 35–46 and accompanying text, *infra*.

[6] 232 U.S. 341 (1914).

[6] In *Weeks*, the accused was arrested without a warrant while the police twice went to his home to search. They gained entry by the assistance of a neighbor and through the help of a boarder, respectively. The fruits of the searches led to an indictment of the accused for use of the mail to promote a lottery. The accused applied to the court for return of the illegally seized items and was denied relief. The Supreme Court held that the items ought to have been returned and not used at trial:

> To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

Id. at 394. The exclusionary rule was applied to the states in Mapp v. Ohio, 367 U.S. 643 (1961).

[7] 251 U.S. 385 (1920).

[8] In *Silverthorn*, the individual accuseds were arrested at their homes while the offices of their company were searched. Upon application to the court, the federal marshal was ordered to return the original copies of all seized documents to the accused. The marshal, however, was permitted to retain copies and photographs of the items and he later used the information gleaned from the retained evidence to subpoena the originals from the accuseds. The accuseds declined to comply with the subpeona and a prosecution for contempt of court ensued. *Id.* at 390–91. The Supreme Court refused to sanction this practice in holding that "knowledge gained by the government's own wrong cannot be used by it . . .". *Id.* at 391.

[9] 371 U.S. 471 (1963).

[10] In *Wong Sun*, based upon information not amounting to probable cause, the police proceeded to a laundry, rang the bell, and observed the owner see the police and flee. The police then entered the laundry and arrested the owner, who then provided them with information which led the police to the accused. *Id.* at 473–76. The Supreme Court refused to allow the government to util-

The Judge Advocate General
Major General Hugh J. Clausen
The Assistant Judge Advocate General
Major General Hugh R. Overholt
Commandant, Judge Advocate General's School
Colonel William K. Suter
Editorial Board
Colonel Robert E. Murray
Major Thomas P. DeBerry
Captain Connie S. Faulkner
Editor
Captain Stephen J. Kaczynski
Administrative Assistant
Ms. Eva F. Skinner

The Army Lawyer (ISSN 0364-1287)

The Army Lawyer is published monthly by the Judge Advocate General's School. Articles represent the opinions of the authors and do not necessary reflect the views of the Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed double spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, Charlottesville, Virginia, 22901. Footnotes, if included, should be typed on a separate sheet. Articles should follow *A Uniform System of Citation* (13th ed. 1981). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. The subscription price is $19.00 a year, $2.50 a single copy, for domestic and APO addresses; $23.75 a year, $3.15 a single copy, for foreign addresses.

Issues may be cited *as The Army Lawyer*, [date], at [page number].

would sustain an objection as "fruit of the poisonous tree" to evidence which had been obtained by exploitation of the illegal police action.[11]

The wall of the exclusionary rule was not without its cracks. The *Silverthorn* Court had stressed that unlawfully obtained facts do not "become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others . . ."[12]. The *Wong Sun* Court advised that evidence which is derivitive of illegal activity may be admitted into evidence if the illegality had not be exploited and the evidence had been discovered "by means sufficiently distinguishable to be purged of the primary taint."[13] Finally, if the causal connection between the illegality and the discovery of the evidence becomes so strained as to offend logic and common sense, the connection may be held to have been "so attenuated as to dissipate [although not to purge] the taint" of the prohibited conduct.[14] To these exceptions would be added the doctrine of inevitable discovery.

Inevitable Discovery Conceived

Enter Martin Fitzpatrick.[15] Fitzpatrick, a suspect in the shooting of two police officers, was traced to his home.[16] The police arrived at the home, knocked on the door, and identified themselves. When neither the knock nor a phone call from the house next door produced an answer, the police, acting without a warrant, entered the home and discovered the accused in a closet.[17] He was handcuffed, brought into the hall, and advised of his rights. When questioned about the location of the weapon which he had used, Fitzpatrick directed the police to a shelf in the closet in which he had been hiding. A search of the closet revealed the weapon and other inculpatory evidence.[18] At a suppression hearing, the trial judge ruled that the government had not established the voluntariness of the statement regarding the location of the weapon. Nevertheless, the weapon was admitted into evidence since "proper police investigation would [in any event] have resulted in a search of that closet."[19] The accused was convicted of first degree murder.[20]

The New York Court of Appeals affirmed the conviction. The court noted a growing body of authority in support of an "inevitable discovery" exception to the exclusionary rule.[21] The rule provides that

---

ize the link to the accused provided by the laundry owner:

> . . . verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the "fruit" of official illegality than the more tangible fruits of the unwarranted intrusion.

Id. at 485–86 (footnote omitted).

[11] *See* discussion accompanying note, *infra*.

[12] 251 U.S. at 392.

[13] 371 U.S. at 488 (quoting R. Maguire, Evidence of Guilt 221 (1959)).

[14] Nardone v. United States, 308 U.S. 338, 341 (1939). *See also* Brown v. Illinois, 422 U.S. 590 (1975).

[15] People v. Fitzpatrick, 32 N.Y.2d 499, 346 N.Y.S.2d 793, 300 N.E.2d 139, *cert. denied*, 414 U.S. 1033 (1973).

[16] The accused had been stopped as a suspect in a gas station robbery. While being questioned, the accused shot two police officers and drove away. One of the injured officers was able to radio in the last name and license plate number of his assailant. This information led the police to the accused. 32 N.Y.2d at 503–04, 346 N.Y.S.2d at 794–95, 300 N.E.2d at 140.

[17] *Id.* at 504, 346 N.Y.S.2d at 795, 300 N.E.2d at 140.

[18] The search also revealed six spent shell casings in the weapon as well as 27 live rounds. *Id.*

[19] *Id.* at 505, 346 N.Y.S.2d at 795, 300 N.E.2d at 140–41.

[20] Fitzpatrick was sentenced to death. *Id.*

[21] *Id.* at 506, 346 N.Y.S.2d at 796, 300 N.E.2d at 141 (citing United States v. Seohlein, 423 F.2d 1051 (4th Cir.), *cert. denied*, 399 U.S. 913 (1970); Wayne v. United States, 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963); People v. Regan, 30 A.D.2d 983 (3d Dep't 1968)(mem.); People v. Soto, 55 Misc.2d 221, 285 N.Y.S.2d 169 (County Ct., Albany County 1967)). Although adverting to inevitable discovery as a basis for admitting evidence, both the *Seohlein* and *Wayne* courts provided alternative bases for their holdings. *See* 423 F.2d at 1053 (search incident to apprehension); 318 F.2d at 213–14 (emergency entry).

evidence obtained as a result of information derived from an unlawful search or other illegal police conduct is not inadmissible under the fruit of the poisonous tree doctrine where the normal course of police investigation would, in any case, even absent of illicit conduct, have inevitably led to such evidence.[22]

In *Fitzpatrick*, it was deemed "entirely fortuitous" that the police searched the closet only after questioning the accused. Given a lawful entry into the house[23] and a valid apprehension,[24] a search of the "grabbable" area surrounding which the accused had been seized would have been a proper search incident to the apprehension.[25] A search of the closet was held to be both inevitable and justifiable in the course of normal police procedures. Martin Fitzpatrick was thus not to receive the "undeserved and socially undesirable bonanza" of the suppression of the pistol.[26] The conviction was affirmed and the doctrine of inevitable discovery had received the imprimatur of the highest court of a state. Many would follow.[27]

Inevitable Discovery in the Military

The doctrine of inevitable discovery first surfaced in military jurisprudence, in theory if not in name, in *United States v. Ball.*[28] In *Ball*, military authorities who were investigating a burglary of the post exchange observed a suitcase similar in description to tone reported stolen in a public locker in a train station. The agents were instructed to watch the locker and to apprehend the claimant of its contents. Instead, two "overzealous" agents gained entry to the locker, searched its contents, and discovered several items which also matched the description of the stolen merchandise.[29] The agents then returned the items to the locker and apprehended the accused when he called for the suitcase. A search of the accused revealed a claim check to another locker in which other stolen property was discovered. At trial, a motion to suppress all such evidence was denied and the accused was convicted of larceny and housebreaking.[30]

The Court of Military Appeals affirmed the conviction. Although initially conceding the illegality of the agents' first search of the locker, the court noted that "an illegal search does not render the subject matter forever immune from search and seizure. If the goods seized were not a product of the illegal search but were independently seizable then they are admissible."[31] In *Ball*, the court found that the eventual seizure of the items in question was not

---

[22] 32 N.Y.2d at 506, 346 N.Y.S.2d at 796, 300 N.E.2d at 141.

[23] The warrantless entry into the home was deemed lawful and necessary in order to prevent the danger to the public of a fleeing, armed, and recently murderous suspect at large. "Speed here was essential." 32 N.Y.2d at 509, 346 N.Y.S.2d at 799, 300 N.E.2d at 143 (quoting Warden v. Hayden, 387 U.S. 294, 299 (1967).

[24] The court found the identification of the accused by name and license plate number, as well as the accused's exclamation upon his discovery by police, "Don't shoot. I give up," to constitute probable cause for his apprehension. 32 N.Y.2d at 509, 346 N.Y.S.2d at 798, 300 N.E.2d at 142-43.

[25] The court noted that neither the removal from the accused from the vicinity of the closet nor the fact that he was handcuffed vitiated the lawfulness of the search. *Id.* at 508, 346 N.Y.S.2d at 798-99, 300 N.E.2d at 143.

[26] *Id.* at 507, 346 N.Y.S.2d at 798, 300 N.E.2d at 142 (quoting Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. Crim. L., Criminology & Police Sci. 307, 317 (1964)). Fitzpatrick did, however, receive the "bonanza" of having his death sentence set aside and the New York statutory death penalty procedure delcared unconstitutional. 32 N.Y.2d at 509-11, 346 N.Y.S.2d at 799-800, 300 N.E.2d at 143.

[27] *See* discussion in United States v. Massey, 437 F.Supp. 843, 853-54 n.3 (M.D. Fla. 1977); State v. Williams, 285 N.W.2d 248, 256-60 (Iowa 1979), *cert. denied*, 446 U.S. 921 (1980).

[28] 8 C.M.A. 25, 23 C.M.R. 249 (1957).

[29] *Id.* at 29, 23 C.M.R. at 253.

[30] *Id.* at 28, 23 C.M.R. at 252. Ball was convicted of larceny of about one hundred items.

[31] *Id.* at 30, 23 C.M.R. at 254 (citing McGuire v. United States, 273 U.S. 95 (1927); Parts Mfg. Corp. v. Lynch, 129 F.2d 841 (2d Cir. 1942)).

the product of the illegal activity, but rather the fruit of a search of the accused incident to his apprehension based upon the lawfully obtained preexisting information that a crime had been committed and that the user of the locker had committed it.[32] Thus, given a basis for the search which was independent of the illegality, the items were held to have been properly admitted into evidence.

It has been noted, however, that there exists a fallacy in the *Ball* court's logic. To the extent that the illegal search of the locker transformed probable cause to "positive knowledge" that the accused was the thief, it cannot be said that the illegal activity in no way "contributed" to the apprehension of the accused. Rather, the holding is more explicable on the theory that, notwithstanding the illegality, the apprehension and ensuing search and seizure would have inevitably occurred.[33]

Whatever the status of inevitable discovery in the military after *Ball*, it appeared that its death knell was sounded in *United States v. Peurifoy*.[34] In *Peurifoy*, the roommate of the accused was suspected of being involved in a larceny. A search of the barracks room, excluding that portion assigned to the accused, revealed some hashish in a common area. The accused was apprehended and his person and automobile were searched.[35] In the car, a checkbook containing checks preprinted with a name other than that of the accused was found. The owner of the checks was located and he indicated that his room had been burglarized two months earlier and that his checkbook had then been stolen.[36] The trial judge found that the search of the automobile had been illegal, but permitted the testimony of the victim of the larceny.[37] The accused was convicted, *inter alia*, of larceny of the checks.[38]

The Court of Military Appeals reversed and ordered the larceny conviction dismissed. In rejecting the government's contention that "the unlawful seizure did no more than accelerate what would otherwise have been the *inevitable discovery* of those thefts," the court held that:

> In our view, *Wong Sun*[40] and the Manual [for Courts-Martial][41] stand for the proposition that where evidence has been obtained by exploitation of the unlawful search, the Government must affirmatively establish that the evidence was *in fact* discovered by a means independent of the illegality. It is not enough that it *could have been* so discovered.[42]

Inasmuch as the government was unable to establish an attenuation-in-fact, the fruits of the search were suppressed. Thus, absent an actual, successful, and independent discovery of the

---

[32] 8 C.M.A. at 30, 23 C.M.R. at 254. The court based its determination that probable cause to apprehend existed upon the description of the suitcase and the experience of the investigators that public lockers were likely locations for soldiers to hide stolen property. *Id.*

[33] Maguire, *supra* note 26, at 311.

[34] 22 C.M.A. 549, 48 C.M.R. 34 (1973).

[35] *Id.* at 550, 48 C.M.R. at 35.

[36] *Id.*

[37] The Air Force Court of Military Review affirmed the larceny conviction by an equally divided vote. *Id.* at 551 n.4, 48 C.M.R. 35 n.4.

[38] The accused was also convicted of larceny of some credit cards and wrongful possession of hashish. *Id.* at 550, 552, 48 C.M.R. at 35, 37.

[39] *Id.* (emphasis added). Presumably, under this theory, the theft would have been discovered when the checks were negotiated. It would appear that this concept of inevitability is a far cry from that envisioned in *Fitzpatrick*.

[40] *See* text accompanying notes 9 & 10 and note 10, *supra*.

[41] Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 152 then provided:

> Evidence is considered as having been obtained as a result of the illegal acts only if it has been acquired by an exploitation of those acts instead of by means sufficiently distinguishable to be purged of the taint of the illegality.

[42] 22 C.M.A. at 552, 48 C.M.R. at 37 (citing United States v. Atkins, 22 C.M.A. 244, 46 C.M.R. 244 (1973); United States v. Moore, 19 C.M.A. 586, 42 C.M.R. 188 (1970)).

evidence in question, the court would refuse to admit evidence tainted by illegal police activity.

Notwithstanding the apparent rejection of inevitable discovery by the military courts, the doctrine received an increasingly favorable reception in the federal court system. In addition to its previous adoption by the Fourth[43] and District of Columbia[44] Circuit Courts of Appeal, inevitable discovery was utilized as a basis for holdings in the Second,[45] Third,[46] Fifth,[47] Seventh,[48] and Eighth[49] Circuits. Indeed, albeit in a footnote, the Supreme Court indicated a willingness to entertain an inevitable discovery argument.[50]

Inevitable Discovery Accepted

The Court of Military Appeals finally endorsed the doctrine of inevitable discovery in *United States v. Kozak.*[51] In *Kozak,* the battalion commander of the accused received information from one of his company commanders that a purportedly reliable informant had indicated that there was a quantity of drugs located in a locker in a German railroad station. The drugs were to be picked up at midnight by either the accused or another servicemember. Acting upon this information, the commander authorized the local Criminal Investigation Command (CID) to observe the locker, apprehend the accused, and, if possible, retrieve the drugs which were alleged to be in the locker.[52] Instead, acting upon instructions of their superiors and in concert with German police, the CID agents proceeded to the station, immediately searched all of the lockers, and discovered a quantity of hashish in one. A portion of the hashish was then replaced in the locker and the locker was resecured. Shortly after midnight, the accused opened the locker, looked inside, slammed his fist, and made an exclamation of disgust. After closing the locker door, the accused was apprehended by the CID and German authorities.[53] At trial, upon defense motion, that portion of the hashish which had been removed from the locker prior to the arrival of the accused was suppressed but he was convicted of possession of the remaining quantity.[54]

On appeal, the Court of Military Appeals allowed that, although there had appeared to exist probable cause for the apprehension and search of the accused,[55] the premature search of the lockers by the CID had exceeded the scope of the battalion commander's search au-

[43] Seohlein v. United States, 423 F.2d 1051 (4th Cir.), *cert. denied,* 399 U.S. 913 (1970).

[44] Wayne v. United States, 318 F.2d 205 (D.C. Cir.), *cert. denied,* 375 U.S. 860 (1963).

[45] United States v. Falley, 489 F.2d 33, 41 (2d Cir. 1973).

[46] Government of Virgin Islands v. Gereau, 502 F.2d 914, 928 (3d Cir. 1974), *cert. denied,* 420 U.S. 309 (1975).

[47] Gissendanner v. Wainwright, 482 F.2d 1293, 1297 (5th Cir. 1973).

[48] United States *ex. rel.* Owens v. Twomey, 508 F.2d 858, 866 (7th Cir. 1974).

[49] United States v. DeMarce, 513 F.2d 755, 758 (8th Cir. 1975).

[50] *See* text accompanying note 77 & note 77, *infra.*

[51] 12 M.J. 389 (C.M.A. 1982).

[52] *Id.* at 389-90.

[53] *Id.* at 390. The testimony at trial revealed that the position of the hashish had been changed, presumably by the accused, from that in which it had been placed by the German police. *Id.* at 390 n.2.

[54] 9 M.J. 929 (A.C.M.R. 1980). The intermediate appellate court upheld the seizure of the hashish on the theory that, when he slammed the locker door and started to walk away from the locker, the accused effectively "abandoned" the hashish, thus surrendering any expectation of privacy in the contents of the locker. *Id.* at 931-32.

[55] 12 M.J. at 390. The court was satisfied that the test established by Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969), for the reliability and basis of knowledge of the informant had been met. The informant had proven reliable in the past in at least three cases which led to drug convictions and was "known to have 'strong religious beliefs and a dislike for drugs'". The informant had related that he had obtained his information by overhearing a conversation between the accused and his partner in crime, both of whom the informant had accurately described. 12 M.J. at 390.

thorization.[56] Consequently, the issue was presented as to the degree to which the evidence had been tainted by its initial illegal discovery so as to render it inadmissible against the accused.

The court noted that the rule which excludes from evidence the fruits of an unlawful search or seizure was not without exception.[57] Among the exceptions lay the inevitable discovery rule. Borrowing heavily its logic and language from *Fitzpatrick*, the court concluded that "[t]he time has come for us to re-examine the applicability of the inevitable-discovery rule to military law."[58] This reappraisal led to an adoption of the rule:

> In applying this exception to the exclusionary rule in the future, we will require that after an accused challenges the legality of a search, the prosecution must, by a preponderance of the evidence, establish to the satisfaction of the military judge that when the illegality occurred, the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence and that the evidence would have been inevitably discovered had not the illegality occurred.[59]

In *Kozak*, it was clear that, based upon the authorization of the battalion commander, the accused would have been apprehended upon his arrival at the locker even without the possession by the authorities of the fruits of the premature search of the locker. Additionally, upon his apprehension, the "grabbable" area, to include the locker, could have been lawfully searched.[60] Therefore, inasmuch as the quantity of hashish would have been discovered in the normal course of lawful police business, the fact that there had preceded an illegal search of the locker became legally and logically irrelevant.[61] The hashish was deemed admissible and the conviction was affirmed.[62]

The teaching of *Kozak* was immediately seized upon as a support for the holding in *United States v. Yandell*.[63] In *Yandell*, a police patrol received information that an individual had been seen carrying a large cardboard box in a furtive manner during the predawn hours.[64] This individual, the accused, was located by the police and stopped. As the accused was producing identification, a policeman observed an item resembling a pill bottle inside the box which the accused had been carrying. The policeman reached into the box[65] and discovered a stereo speaker; various assorted pills were also removed from the box. A police su-

---

[56] The authorization of the battalion commander was deemed "quite specific." He had intended only a search of "the individual and the *possessions* of the individual assigned to [his] command," *id.* at 390 n.4 (emphasis in opinion); a search of *all* lockers was *not* foreseen. *Id.* at 390.

[57] *Id.* at 391. *See* text accompanying notes 12–14, *supra*.

[58] *Id.* at 392 (footnote omitted).

[59] *Id.* at 394.

[60] *Id.* at 393. The court found the locker to be within the "grab area" of the accused such that a search of it would have been justified as incident to the lawful apprehension of the accused. *Id.* & n.10 (citing New York v. Belton, 453 U.S. ____, 101 S.Ct. 2860 (1981), Chimel v. California, 395 U.S. 752 (1969), People v. Floyd, 26 N.Y.2d 558, 312 N.Y.S.2d 193, 260 N.E.2d 815 (1970)).

[61] Following the cautious approach of the federal courts, however, *see* discussion in note 21, *supra*, the military court was careful to provide alternative bases for its holding. *See* 12 M.J. at 393–94 n.11.

[62] *Id.* at 394. Under the rationale of *Kozak*, at prosecution of the accused for the larger quantity of the hashish would have been possible. Logically, the same inevitability which surrounded the discovery of the portion of the hashish for which there was a successful prosecution also surrounded that quantity which had been removed from the locker by the authorities.

[63] 13 M.J. 616 (A.F.C.M.R. 1982).

[64] The accused was observed to be running from building to building while avoiding lighted areas and running through lighted areas when necessary. *Id.* at 617.

[65] At trial, the policeman explained that he reached into the box both out of curiosity and for his own protection: "You always hear about these guys ... just for stopping somebody for a traffic violation, and then get shot ... and you never know what's going to happen next." *Id.* at 618.

pervisor arrived at the scene and was informed of the discoveries. The accused was thereupon "frisked" and a screwdriver, a butterknife, a bent fork, a bent bobby pin, and a plastic medical card belonging to another servicemember were located. It was subsequently learned that the base pharmacy hospital had been broken into and ransacked. The accused was tried and convicted for this crime.[66]

On appeal, the Air Force Court of Military Review held that the action of the policeman in reaching into the box was a lawful incident of a "stop and frisk" of the accused.[67] Alternatively, however, the court reasoned:

> Further, the discovery and seizure of the drugs in the box was inevitable. Once the frisk was completed, probable cause existed to apprehend the accused and a search incident to that apprehension would unquestionably have encompassed the box.[68]

If allowed to stand as an inevitable discovery case, *Yandell* significantly expands *Kozak*. In *Kozak*, probable cause to apprehend the accused pre-existed the illegal activity; the accused would have been apprehended despite and independently of the search of the locker.[69] In *Yandell*, probable cause would not have existed until after the frisk which occurred after the search of the box and which was conducted, at least in part, based upon the discovery of the contents of the box. At the time of police action, there existed nothing more than "the suspicion of any alert police officer" that criminal activity was afoot.[70] *Yandell* thus anticipates a good deal more "inevitability" than did *Kozak* and may represent an extension of inevitable discovery to an earlier stage of a criminal investigation than existed in *Kozak*. It is submitted, however, that *Yandell* should be considered more of an authority on the law of "stop and frisk" than on the law of inevitable discovery.

The Scope of Inevitable Discovery

Counsel should be aware of the scope and limitations of the doctrine. Inevitable discovery is, of its nature, an argument of last resort; to utilize it is to concede, either as an initial or alternative position, that a given search or seizure was illegal. Once deemed a necessary theory of admissibility, two hurdles must be crossed by the advocate.

First, a main criticism of the doctrine is the necessarily hypothetical nature of an inevitable discovery inquiry.[71] The court will not have before it an actual discovery based upon legally obtained, independent information or upon information with which the connection to the illegal activity has been attenuated or of which the taint has been purged. Rather, the court must inquire into an event which never happened. It is therefore incumbent upon counsel to establish that the evidence in question *would* have been discovered by the pursuit of lawfully obtained leads.[72] A high degree of probability will be required.[73]

---

[66] The accused was convicted of housebreaking, larceny, damaging government and private property, and possession of marijuana. *Id.* at 617.

[67] *See* Terry v. Ohio, 392 U.S. 1 (1968); Mil. R. Evid. 314(f)(1) & (2).

[68] 13 M.J. at 619 (citing United States v. Kozak, 12 M.J. 389 (C.M.A. 1982)).

[69] *See* text accompanying notes 58–60, *supra*.

[70] 13 M.J. at 618. Under the *Yandell* rationale, this suspicion would provide an "independent source", apart from the information gleaned from the search of the box, to justify the frisk by the police supervisor which, in turn, would have produced the probable cause for the apprehension incident to which the box would have been searched.

[71] *See* discussion in Note, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules, 74 Colum. L. Rev. 88, 90 (1974) [hereinafter cited in Columbia Note]. But see* Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 Tex. L. Rev. 736 (1972).

[72] United States *ex. rel.* Owens v. Twomey, 508 F.2d 885 (7th Cir. 1974); United States v. Falley, 489 F.2d 33 (2d Cir. 1973); United States *ex. rel.* Roberts v. Turnello, 407 F. Supp. 1172 (E.D.N.Y. 1976); United States v. Kozak, 12 M.J. 389 (C.M.A. 1982).

[73] People v. Payton, 45 N.Y.2d 300, 408 N.Y.S.2d 395, 380 N.E.2d 224 (1978).

The case of *State v. Williams*[74] is instructive. Once known as the "Christian burial speech" case, *Williams* involved the discovery of the body of a murder victim by virtue of information obtained through an interrogation of a suspect at a time when he had first elected to speak with counsel.[75] The conviction was reversed by the Supreme Court.[76]

At Williams' retrial, taking a cue from the Supreme Court,[77] the government relied upon inevitable discovery to support the testimony concerning the location and condition of the body. Testimony was adduced from investigators concerning the progress and scope of the search for the body prior to the acquisition of the tainted information.[78] It was developed that, although the county in which the body was later found was not within the original scope of the search, the search would have certainly extended to that county when searchers were unsuccessful in their original plan.[79] The body was discovered in a culvert, one of the places to which the searchers were instructed to pay particular attention,[80] was clad in a bright color,[81] was only lightly covered with snow,[82] and was configured such that it was unlikely that the entire body would become completely snow-covered.[83] Finally, testimony concerning the temperatures encountered during the time in question revealed that the body would not have decayed until four months after its discovery.[84] Faced with this record bespeaking inevitability, the suppression motion was denied, the accused was again convicted, and the Supreme Court denied review.[85]

Secondly, although unmentioned in *Kozak*, the government should seek to establish, if possible, a lack of bad faith on the part of investigators in obtaining tainted information and exploiting their illegal activity. A chief criticism leveled at inevitable discovery is that it subverts an underpinning of the exclusionary rule, that of seeking to deter illegal police activity.[86] Certainly, if police are aware that, despite

---

[74] 285 N.W.2d 248 (Iowa 1979), *cert. denied*, 446 U.S. 921 (1980).

[75] Brewer v. Williams, 430 U.S. 387, 390–92 (1977). The accused had been apprehended for the murder of a young girl. While in police custody, he spoke with one attorney by phone and with another in person. The latter attorney notified the police that they were not to question the accused until the two attorneys had conferred. *Id.* at 391–92. Nonetheless, while the accused was being transported to the apporpriate jurisdiction by the police, one detective, knowing of the accused's professed deep religious beliefs and addressing the accused as "Reverend," told the accused of his hopes that the victim's body could be found before it was covered by snow because "the parents of the little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered." *Id.* at 392–93. A discussion concerning the search for the body ensued and the accused eventually led the police to it. *Id.* at 393.

[76] The Court held that the " 'Christian burial speech' had been tantamount to interrogation" in violation of the accused's right to counsel. *Id.* at 400.

[77] In a footnote, the Court had speculated:

> While neither Williams' incriminatory statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had the incriminatory statements not been elicited from Williams.

Id. at 407 n.12.

[78] 285 N.W.2d at 261–62.

[79] The search was terminated when the accused directed the authorities to the location of the body. At that point, the searchers were two and one-half miles from its position. *Id.* at 261–62.

[80] *Id.* at 262.

[81] The victim had been clad in an orange and white blouse. *Id.*

[82] Only an inch of snow had fallen. *Id.*

[83] "In addition, the left leg of the body was poised in midair, where it would not have been readily covered by a subsequent snowfall." *Id.*

[84] The accused led the police to the body in late December 1968. It was estimated that the body would have remained preserved in its frozen state until April 1969. *Id.*

[85] 446 U.S. 921 (1980).

[86] *See, e.g.*, United States v. Castellana, 488 F.2d 65,68 (5th Cir. 1974); United States v. Massey, 437 F. Supp. 843, 853 n.3 (M.D. Fla. 1977); Columbia Note, *supra* note 71, at 99–100.

knowing and intentional illegal activity, a conviction may nonetheless be had, then the less scrupulous among the profession may flaunt the law. Just such an issue concerned the *Williams* court.[87] In *Williams*, however, the court had the benefit of not only the testimony of the officers involved, but also the history of the case to date which indicated a wide rift of opinion amongst appellate authorities over the propriety of the officer's conduct. Given this division among lawyers, the court had little problem in attributing a lack of evil motive to the police.[88]

Williams should be contrasted with *United States v. Griffin*.[89] In *Griffin*, the police had dispatched an officer to obtain a search warrant but, while waiting for his return, broke into the house in question and discovered evidence later sought to be introduced against the accused.[90] The Sixth Circuit expressly rejected the government's argument that a *Fitzpatrick* rationale of inevitable discovery—that the items would have been discovered anyway upon the obtaining of the warrant—should be applied to the case.[91] The court found a much greater degree of official illegality in *Griffin* than in *Fitzpatrick* and suppressed the fruits of the warrantless entry. "Any other view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment."[92]

It bears repeating that the exclusionary rule was developed, in part, to seek to deter unlawful police activity and achieve a balance between the legitimate needs of effective law enforcement and the justifiable right to privacy of the citizen.[93] The success of an inevitable discovery argument in a given case or its survivability as an exception to the exclusionary rule will depend in large part upon the nature of police conduct which is presented to the courts.

Conclusion

Inevitable discovery may arise in varied contexts in the military. As in *Kozak*, an investigator may prematurely execute a search.[94] A search may be properly authorized, based upon probable cause, but may be performed by a disqualified individual.[95] An item discovered during an illegal search might well have been discovered anyway during a previously scheduled inspection.[96] Judge advocates should be alert to utilize the new tool given them by the courts. Properly invoked, the doctrine of inevitable discovery provides an effective means for salvaging an otherwise improper search and guaranteeing that the trial will be in fact a search for truth.

---

[87] 285 N.W.2d at 259. The court opted to adopt a two-pronged test proposed in 3 W. LaFave, Search & Seizure § 11.4, at 620–21 (1978):

> First, use of the doctrine should be permitted only when the police have not acted in bad faith to accelerate the discovery of the evidence in question. Second, the State must prove that the evidence would have been found without the unlawful activity and how that discovery would have occurred.

285 N.W.2d at 258.

[88] *Id.* at 260–61.

[89] 502 F.2d 959 (6th Cir.), *cert. denied*, 419 U.S. 1050 (1974).

[90] 502 F.2d at 960.

[91] *Id.* at 960–61.

[92] *Id.* at 961.

[93] *See* La Fave, *supra* note 87, at § 11.4(a), at 620–628.

[94] *See* text accompanying notes 51–62, *supra*.

[95] One can easily posit the situation in which information sufficient to establish probable cause to search a particular soldier's room is presented to a commander, who then authorizes his first sergeant to conduct the search. The first sergeant departs. The commander, whether out of curiosity or a sense of responsibility, follows and overtakes the first sergeant and opens the door to the room. In plain view lay contraband or evidence of a crime. In this situation, the commander may have strayed over the line from magistrate to investigator as set forth in United States v. Ezell, 6 M.J. 307 (C.M.A. 1979). What is certain, however, is that the same evidence would have inevitably been found by the first sergeant in an unquestionably lawful manner only a few moments later.

[96] An analogy may be drawn to People v. Soto, 55 Misc.2d 221, 285 N.Y.S.2d 169 (County Ct., Albany County 1967). In *Soto*, the accused was apprehended for an assault and, without benefit of rights warnings, questioned concerning the location of the knife which he had used. He told the police that he had thrown the knife in a mail-

box near the crime scene. The weapon was then retrieved. In refusing to suppress the knife, the court noted that, regardless of the illegal police interrogation, the knife would have in any event been discovered at 0800 on the following day when the postman routinely emptied the mailbox. *Id.* at 220-21, 285 N.Y.S.2d at 170. It might be argued that, depending upon the imminency of the inspection involved and the nature of the item discovered, the *Soto* rationale may be applied to military inspections and administrative inventories as well.

Interlocking Confessions in Courts-Martial

CPT James H. Weise
30th Graduate Class, TJAGSA

Introduction

Joint trials are authorized in both the civilian and military judicial systems. The joint trial has often been lauded as an excellent method of handling such problems as inconsistent findings, cost, and unnecessary delay. In addition, it has also been condemed for compromising the rights of codefendants.[1] This article will examine the problem of insuring a defendant's right to confrontation at a joint trial when his codefendant has confessed. Special emphasis will be given to interlocking confessions, *i.e.*, confessions by the defendant and the codefendant that corroborate each other.[2] This article will summarize the leading federal and military cases in the area and analyze the most recent Supreme Court and Court of Military Appeals cases in order to point out the practical and legal problems that flow from the use of interlocking confessions in courts-martial.

The Right

A defendant in a criminal proceeding is guaranteed the right to confront his accusers. The guarantee is found in the confrontation clause of the sixth amendment of the United States Constitution and provides: In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." The confrontation right is usually exercised by cross-examining the accuser. A problem arises when the accusation takes the form of an extrajudicial statement by a codefendant at a joint trial. The self-incrimination clause of the fifth amendment of the United States Constitution states: "No person shall . . . in any criminal case be compelled to be a witness against himself."[3] If the codefendant exercises his fifth amendment right, he cannot be compelled to testify. The exercise by the codefendant of his fifth amendment right not to testify unfortunately conflicts with the defendant's sixth amendment right to cross-examine his accuser.[4] Hence, when a defendant at a joint trial does not testify, but his out-of-court statement which implicates both him and his codefendant is admitted, it is hearsay and the codefendant's confrontation right is violated.[5] While such a statement may be used at the joint trial against its maker, it cannot be used against his codefendant. A major problem at a joint trial has always been how to employ such an admission against its maker and simultaneously not prejudice a codefendant.[6] One solution to the problem supposedly recognizes the hearsay limita-

[1] Note, *Bruton Doctrine Inapplicable in Cases Involving Interlocking Confessions—Parker v. Randolph*, 28 De Paul L. Rev. 1161, 188 n.147 (1979) [hereinafter cited as De Paul Note].

[2] Marcus, *The Confrontation Clause and Co-Defendant Confessions: The Drift From Bruton to Parker v. Randolph*, U. Ill. L. F. 559, 560 n.8 (1979) [hereinafter cited as Marcus].

[3] U.S. Const. amend V.

[4] *See* Note, Parker v. Randolph: *Narrowing the Scope of the Confrontation Clause in Interlocking Confession Cases*. 46 Brooklyn L.Rev. 345, 346 (1980) [hereinafter cited as Brooklyn Note].

[5] *See* Casenotes, *Evidence: The Right of Confrontation and the Admission of Interlocking Confessions at a Joint Trial*, 26 Wayne L. Rev. 1591, 1593 (1980) [hereinafter cited as Wayne Note].

[6] De Paul Note, *supra* note 1, at 1164.

tions and attempts to cure all hearsay problems by instructing the jury to limit the use of a confession or statement to its maker and not to use it for determining the guilt of a codefendant.[7]

The *Delli Paoli* Presumption

In 1957 the Supreme Court considered the issue of whether a limiting instruction to a jury was, in fact, a satisfactory means of protecting an accused's confrontation rights when he was not permitted to cross-examine the confessing codefendant.[8] In *Delli Paoli v. United States*[9] several codefendants were charged with conspiracy. At their joint trial, none testified but all were convicted. One defendant's pretrial confession that implicated the others was entered into as evidence. The jury was instructed to consider the statement only against its maker.[10] The Supreme Court sanctioned this procedure in holding that there was a reasonable presumption that a jury would follow the court's instructions and thereby disregard the confessing codefendant's statement when deciding the verdict of another codefendant.[11] The Court decided that clear limiting instructions would prevent any prejudice to the codefendants.[12] In essence, the Supreme Court in *Delli Paoli* professed its belief in the jury's ability to follow instructions as given:[13]

> It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that the law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions as clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanism in human experience for dispensing substantial justice.[14]

Justice Frankfurter's strong dissent in *Delli Paoli* would become the basis for a majority opinion on the same issue several years later. In his dissent, Justice Frankfurter challenged the majority's basic premise of the jury system and told why jurors are at times not able to comply with instructions:[15]

> The dilemma is usually resolved by admitting such evidence against the declarant but cautioning the jury against its use in determining the guilt of the others. The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissable declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell.[16]

The majority opinion in *Delli Paoli* gave more discretionary authority to trial judges and narrowed the grounds for review of the trial court's decisions on the admissibility of out-of-court statements by codefendants. After *Delli Paoli*, a trial judge would look at the evidence in a case exclusive of the out-of-court statement by a codefendant. If the judge found the statement to be cumulative, he would admit the statement into evidence and give the jury definite instructions on its limited use. In prac-

---

[7] 1 C. Wright, Federal Practice and Procedure § 224, at 449 (1969 ed.).

[8] Note, *Parker v. Randolph: Redacting the Bruton Rule*, 3 Crim. Just. J. 522 (1980) [hereinafter cited as Justice Note].

[9] 352 U.S. 232 (1957).

[10] Note, *Parker v. Randolph: The Right of Confrontation and the Interlocking Confession Doctrine*, 32 Hastings L. J. 305, 309 (1980) [hereinafter cited as Hastings Note].

[11] De Paul Note, *supra* note 1, at 1165.

[12] Marcus, *supra* note 2, at 561.

[13] Hastings Note, *supra* note 10, at 310.

[14] 352 U.S. at 242.

[15] Marcus, *supra* note 2, at 561.

[16] 352 U.S. at 247-248.

tice, trial judges were given absolute discretion regarding severance. Appellate courts could consider only the clarity of the limiting instructions.[17]

The Presumption Weakens

The *Delli Paoli* decision was criticized by a majority of the commentators. Several lower courts opined that it was erroneous to assume in every case that limiting instructions would be sufficient to insure the confrontation rights of defendants.[18] In its 1964 decision of *Jackson v. Denno,*[19] The Supreme Court strongly suggested that it was abandoning its position in *Delli Paoli*. The Court held in *Jackson* that a trial judge should decide whether a confession is admissible before the jury is told of the existence of a confession or its contents. It was the belief of the court that jurors would not be able to disregard a confession, even if the confession was later determined not to be admissible.[20] Hence, the procedure which allows jurors to decide a confession's voluntariness after being instructed not to consider the confession if they determined it to be involuntary was declared unconstitutional. Of particular interest was the fact that the Court cited the dissent in *Delli Paoli* in regard to its questioning of whether jurors would be able to disregard an involuntary confession. Such action was observed by others to detract from *Delli Paoli* because of the Court's view that it is harder for jurors "to disregard as against one defendant a voluntary confession it has properly used as against another than it is for the jurors to disregard altogether a confession they have found to be involuntary."[21] Even though *Jackson* involved the voluntariness of a confession, it served as an indicator that the Supreme Court was moving away from its position that limiting instructions were effective in properly protecting confrontation rights.[22]

The *Delli Paoli* presumption that jurors can disregard damaging evidence was further weakened by the Supreme Court in its 1965 opinion in *Douglas v. Alabama.*[23] At Douglas' trial, a previously convicted co-conspirator was called as a prosecution witness but refused to testify.[24] The prosecutor read from the witness' purported confession which implicated Douglas and, in the presence of the jury, questioned the witness about the confession.[25] The Supreme Court ruled that Douglas' confrontation rights were violated because he was not able to cross-examine the individual whose out-of-court statement had implicated him and had been disclosed to the jurors.[26]

Another development after the *Delli Paoli* decision suggested that its rationale was being cast aside. In 1966 the Supreme Court adopted an amendment to Rule 14 of the Federal Rules of Criminal Procedure which stated: "In ruling on a motion by a defendant for serverance the court may order the attorney for the government to deliver the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at trial."[27] The Advisory Committee Note was skeptical regarding the value of limiting instructions. If a statement inculpated other codefendants, the amendment highly suggested the use of corrective measures including severance.[28]

The End of the *Delli Paoli* Presumption—*Bruton v. United States*

The end of *Delli Paoli* finally came in 1968

---

[17] Brooklyn Note, *supra* note 4, at 257.

[18] Hastings Note, *supra* note 10, at 311.

[19] 378 U.S. 368 (1964).

[20] De Paul Note, *supra* note 1, at 116.

[21] Wright, *supra* note 7, at 451.

[22] Hastings Note, *supra* note 10, at 311.

[23] 380 U.S. 415 (1965); De Paul Note, *supra* note 1, at 1165.

[24] *Id.*

[25] Brooklyn Note, *supra* note 4, at 359 n. 72.

[26] De Paul Note, *supra* note 1, at 1165.

[27] 1 Wright, *supra* note 7, at 452.

[28] *Id.*

when it was expressly overruled by the Supreme Court's landmark decision in *Bruton v. United States*.[29] At the joint trial of Burton and Evans, a postal inspector testified regarding Evans' oral confession which inculpated Bruton. Evans did not testify. The trial judge instructed the jurors that the confession was admissible against Evans but had to be disregarded in deciding the verdict for Bruton.[30] The subject before the Supreme Court was again the adequacy of limiting instructions as a means of protecting the confrontation right at a joint trial.[31] The Court indicated that the confessing codefendant's statement was a major contributor to the government's case and thereby virtually destroyed Bruton's defense. Because of these circumstances, instructions to the jury were deemed totally inadequate to shield the accused from the possibility that the jurors could not delete the incriminating remarks of the codefendant from their minds in deciding the accused's guilt. Because the portion of Evan's statement that implicated Bruton was not subject to cross-examination, the Supreme Court held that its admission into evidence was in violation of Bruton's sixth amendment confrontation rights.[32]

The court in *Bruton* addressed three arguments that were used in its former view in *Delli Paoli*. First was the prior position that the admission of a defendant's confession that was not subject to cross-examination but was accompanied by limiting instructions furthered the quest for truth.[33] The Court's response in *Bruton* was that such a position "overlooks alternative ways of achieving that benefit without at the same time infringing the nonconfessor's right of confrontation. Where viable alternatives do exist, it is deceptive to rely on the pursuit of truth to defend a clearly harmful practice."[34] A second reason often employed to support the use of limiting instructions is the policy of judicial economy, *i.e.*, not losing the benefits of joint trials. The Court's *Bruton* response was that the benefits to the judicial system regarding joint trials were secondary to the constitutional confrontation rights of an accused.[35] A third argument employed in *Delli Paoli* was that failing to employ limiting instructions at joint trials would damage the foundations of the jury procedures. The *Bruton* response was that while great faith should be placed in the jury in the majority of the cases, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great and the consequences of failure so vital to the defendant, that the practical and human limitations on the jury system cannot be ignored."[36]

Bruton Severance and Other Alternatives

Bruton did not say that there could never be a joint trial if a codefendant confessed.[37] The Court did hold that severance was the best solution,[38] but it also spoke briefly of alternative methods of using a confession against its maker and still not infringing upon a codefendant's confrontation rights. The best method to explore potential alternatives is to hold an in camera inspection of the statement or confession.[39]

A number of alternatives to a *Bruton* severance exist. An obvious one is for the prosecuting attorney to state that the codefendant's statement will not be used as evidence.[40] This is one of two alternatives to severance advo-

---

[29] 391 U.S. 123, 126 (1968).

[30] Justice Note, *supra* note 8, at 522.

[31] Hastings Note, *supra* note 10, at 312.

[32] Brooklyn Note, *supra* note 4, at 358, 359.

[33] Hastings Note, *supra* note 10, at 313.

[34] 391 U.S. at 133-34 (footnote omitted).

[35] Marcus, *supra* note 2, at 565.

[36] 391 U.S. at 135.

[37] Wright, *supra* note 7, at 454.

[38] Dawson, *Joint Trial of Defendants in Criminal Cases: an Analysis of Efficiencies and Prejudices*, 77 Mich. L. Rev. 1379, 1412 (1979) [hereinafter cited as Dawson].

[39] Wright, *supra* note 7, at 454.

[40] Dawson, *supra* note 38, at 1413.

cated by the American Bar Association's Standards Relating to the Administration of Criminal Justice. The other alternative favored by the Standards is to delete all references to the nonconfessing defendant in such a way as not to prejudice the nonconfessing defendant.[41] This second method is known as redaction and involves omitting the accusatory parts of a statement while keeping its substance.[42]

Redaction is not without several faults and does present practical problems in its implementation.[43] For example, the employment of redaction might not stop the jurors from connecting the codefendant's references to another party to the defendant; therefore, a fair redaction may be difficult or impossible to achieve. Another problem that may arise is the possibility of prejudice to the confessor when redaction leads to distortions. Likewise, the value of the statement as evidence against the confessor may be lost if important passages are omitted. A final problem involves oral statements. Either a witness or an attorney may inadvertently refer to the codefendant's statement inculpating the accused.[44]

A third alternative to a *Bruton* severance is bifurcation. At a bifurcated trial the jurors hear all the evidence against the defendants with the exception of the codefendant's confession. After the nonconfessing defendant's verdict is decided, the jury hears the codefendant's confession and decides that verdict as well. The procedure is seldom employed and serious doubts have been voiced about its use.[45]

A fourth alternative employs the use of multiple juries at one trial. In this procedure different injuries decide the guilt of the defendant and his confessing codefendant. The juries hear all the evidence together except for the confession. Only the confessing codefendant's jury hears the confession. Separate opening and closing remarks are used for the different juries. This procedure should not be confused with separate trials of codefendants that occur at the same time in separate courtrooms.[46]

A final alternative to a *Bruton* severence is when the defendant incriminated by his codefendant's confession has the opportunity to cross-examine the confessing codefendant.[47] The Supreme Court in *Nelson v. O'Neil*[48] and the Court of Military Appeals in *United States v. Gooding*[49] both concluded that there is not a *Bruton* error if the confessing codefendant took the stand. This is so even if the nonconfessing defendant did not cross-examine the confessor because the confrontation right is preserved by the opportunity to cross-examine.[50]

A few weeks after its *Bruton* decision, the Supreme Court decided *Roberts v. Russell*,[51] which made *Bruton* retroactive. "Ordinarily, retroactive application of a constitutional ruling indicates that the ruling was concerned with serious constitutional error requiring automatic reversal."[52] However, the year after *Bruton*, the Supreme Court in *Harrington v. California*[53] decided that a violation of *Bruton* did not automatically require reversal. Because Harrington's own inculpatory statement and the testimony of impartial eyewitnesses were in evidence, the Court found that, despite a

---

[41] American Bar Ass'n Project on Standards for Crim. Justice, Joinder and Severence § 2.3(a)(1968).

[42] Dawson, *supra* note 38, at 413.

[43] More is required in redaction than lining out the codefendant's name. *See, e.g., United States v. Pringle*, 3 M.J. 308 (1977); *United States v. Green*, 3 M.J. 320 (1977).

[44] Haddad, *Post-Bruton Developments: A Reconsideration of the Confrontation Rationale, and a Proposal for a Due Process Evaluation of Limiting Instructions*, 18 Am. Crim. L. Rev., 4 (1980) [hereinafter cited as Haddad].

[45] *Id.* at 4, 5.

[46] *Id.* at 5.

[47] Dawson, *supra* note 38, at 1415.

[48] 402 U.S. 622 (1971).

[49] 18 C.M.A. 188, 39 C.M.R. 188 (1969).

[50] Dawson, *supra* note 38, at 1415.

[51] 392 U.S. 293 (1968).

[52] Wayne Note, *supra* notes, at 1594.

[53] 395 U.S. 250 (1969).

Bruton violation, the error was harmless in light of the overwhelming evidence. The Court seemed to attach no special weight to defendant's admission.[54] The doctrine of harmless constitutional error was thus extended to *Bruton* violations where the codefendant's statement amounted to cumulative evidence.[55] Likewise the harmless error analysis was applied by the Court in *Schneble v. Florida,*[56] a case involving interlocking confessions, *i.e.*, the statements of the codefendants were almost identical.[57] Since an avalanche of evidence derived from Schneble's own confession was available, the Court declared the codefendant's confession to be cumulative and the *Bruton* error harmless.[58]

Along with the harmless error doctrine, the Supreme Court and lower courts began to suggest and recognize numerous *Bruton* exceptions. Courts have found *Bruton* inapplicable when the confessing defendant takes the stand to testify and is subject to cross-examination, when a defendant's statement is admissible against his codefendant under the forum's laws, when the codefendant is not implicated by the confession of the defendant, and when the trial is by judge alone.[59]

Interlocking Confessions—The Most Controversial *Bruton* Exception

Of all the proposed *Bruton* exceptions, the greatest division of opinion has been generated over the exception commonly known as interlocking confessions. This exception was generated at the appellate level for cases where each defendant at a joint trial confessed and inculpated himself and his codefendant. The idea for the interlocking confessions exceptions initially was the brainchild of the United States Court of Appeals for the Second Circuit in *United States ex. rel. Catanzaro v. Mancusi.*[60] In *Catanzaro,* the court curtly rejected the idea of *Bruton* error. *Bruton* was distinguished based upon the fact that only one defendant has confessed there, whereas in *Catanzaro,* both the defendant and codefendant had confessed and their confessions interlocked and complemented each other. This was sufficiently different for the Second Circuit to decide that *Bruton* was inapplicable.[61] The Second Circuit's rationale was that there was virtually no risk of harm to the defendant in not being able to cross-examine a codefendant whose statement implicated him when the defendant had confessed himself.[62]

Even the Supreme Court's application of the harmless error doctrine to *Bruton* did not dampen the growth of the interlocking confessions exception. The Second Court continued to follow the exception.[63] The idea was accepted by the Fifth[64] and the Seventh Circuits,[65] although these circuits have mixed a harmless error analysis with the interlocking confessions exception. The Third[66] and the Sixth[67] Circuits did not accept the exception. Both the Eighth[68] and the Tenth[69] Circuits indicate that the ap-

[54] Dawson, *supra* note 38, at 1419.

[55] Brooklyn Note, *supra* note 4, at 363 n.95.

[56] 405 U.S. 427 (1972).

[57] Brooklyn Note, *supra* note 4, at 363.

[58] *Id.*

[59] Haddad, *supra* note 44, at 5,9,16,20,26.

[59] Brooklyn Note, *supra* note 4, at 365.

[60] 404 F.2d 296 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970).

[61] Brooklyn Note, *supra* note 4, at 365.

[62] Hastings Note, *supra* note 10, at 318.

[63] United States *ex. rel.* Stanbridge v. Zelker, 514 F.2d 45 (2d Cir.), *cert. denied*, 423 U.S. 872 (1975).

[64] Mack v. Maggio, 538 F.2d 1129 (5th Cir.), *cert. denied*, 429 U.S. 1025 (1976).

[65] United States v. Fleming, 594 F.2d 598 (7th Cir.), *cert. denied*, 442 U.S. 931 (1979).

[66] United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

[67] Hodges v. Rose, 570 F.2d 643 (6th Cir.), *cert. denied*, 436 U.S. 909 (1978).

[68] Hall v. Wolf, 539 F.2d 1146 (8th Cir. 1976).

[69] Metropolis v. Turner, 437 F.2d 207 (10th Cir. 1971).

proach to interlocking confessions and harmless error is one without difference. The Ninth Circuit has continuously used the harmless error route at all times.[70] The Supreme Court granted certiorari to settle the differences in the circuits on the matter of the interlocking confessions doctrine in *Parker v. Randolph*.[71]

Parker v. Randolph—The Supreme Court's Plurality Position on Interlocking Confessions

The issue in *Parker v. Randolph*[72] was whether a *Bruton* violation had occurred when interlocking confessions were admitted into evidence and limiting instructions were given but the confessing codefendants were not subject to cross-examination. By a plurality of four, the Supreme Court ruled that there was no *Bruton* violation in such circumstances and, in essence, expressed the old *Delli Paoli* assumption that jurors would abide by limiting instructions. Despite its desire to settle the conflict among the circuits on the admissibility of interlocking confessions, the Supreme Court failed to do so. Four of the eight justices did agree that *Bruton* was not violated when interlocking confessions were admitted and the confessors were not subject to cross-examination. Four other justices did find a *Bruton* violation, although one found it to be harmless and joined the plurality to affirm the conviction. The Supreme Court's decision in *Parker* has been criticized, among other reasons, because the Court failed to define exactly what amounts to a confession for the purpose of the interlocking confessions exception and how much one confession must interlock with another.[73] Because the Court split on the interlocking confessions exception to *Bruton*, the lower courts remain free to decide the matter as they see fit because the plurality opinion has no binding effect as precedent.[74]

The Military Approach

Where does all of this leave military practitioners who are concerned with the use of interlocking confessions at courts-martial? The military has its own procedural guidance in Rule 306 of the Millitary Rules of Evidence[75] and in the opinions of the Court of Military Appeals.

The drafters' analysis if Rule 306 indicates that the rule was taken from former paragraph 140*b* of the Manual for Courts-Martial. A comparison of the fifth subparagraph of this provision and the present Rule 306 reveals that they are almost identical. Rule 306 essentially states the *Bruton* holding. The drafters of Rule 306 were aware of the Supreme Court's *Parker* plurality but decided to stay with *Bruton* for handling interlocking confessions.[76] Therefore, the requirements of Rule 306 should be complied with whenever interlocking confessions are used in courts-martial.[77]

The Court of Military Appeals followed the traditional *Bruton* approach in regard to redac-

---

[70] Brooklyn Note, *supra* note 4, at 365, 366 n.113.

[71] 439 U.S. 978 (1978).

[72] 442 U.S. 62 (1979).

[73] Wayne Note, *supra* note 5, at 1597, 1598, 1600, 1605.

[74] Haddad, *supra* note 44, at 29, 29 n.146. The Ninth Circuit in United States v. Expericueta-Reyes, 631 F.2d 616, 624 n.11 (9th Cir. 1980) and the Eighth Circuit in United States v. Parker, 622 F.2d 298, 301 (8th Cir. 1980), have elected not to follow the Supreme Court's plurality analysis.

[75] Mil. R. Evid. 306 provides:

> When two or more accused are tried at the same time trial, evidence of a statement made by one of them which is admissible only against him or her or only against some but not all of the accuseds may not be received in evidence unless all references inculpating an accused against whom the statement is inadmissible are deleted or the maker of the statement is subject to cross- examination.

[76] *See* Analysis to Mil. R. Evid. 306, *reprinted in* Manual for Courts-Martial, United States, 1969 (Rev. ed.), App. 18, at A18-29.

[77] A. Saltzurg, L. Schinasi, D. Schleuter, Military Rules of Evidence Manual 102, 103 (1981).

tion problems in both *United States v. Pringle*[78] and *United States v. Green*[79] In *Pringle*, three codefendants were tried. Pringle had been implicated by the pretrial statements of the other two codefendants. The makers of the statements did not testify at trial. The only adaction used was to "white out" Pringle's name and the statements were given to the courtmembers along with a copy of the charge sheet which named all three codefendants. The Court of Military Appeals pointed out that the federal courts had avoided problems by using substituted phrases for names and by reading the confession to the jurors instead of giving the statement to them. Under these circumstances, the court decided that the method of redaction chosen in *Pringle* was insufficient and prejudiced the accused because the speculation as to the identity of the redacted name was "compulsively directed" toward Pringle.[80] Similarly, in *Green*, the accused's name have been "lined out" in the pretrial statement of a codefendant which implicated Green. Although the codefendant did not testify, the statement was admitted and given to the courtmembers along with a copy of the charges. The court found this similar procedure to be an ineffective method of redaction and stated that, because severance was not granted, the statement of the codefendant was not admissible.[81] It is of interest to note that, in both cases, Judge Cook dissented. It was his desire in 1977, prior to the *Parker* decision, to apply the interlocking confessions rationale of the Second Circuit to uphold hold the convictions in both *Pringle* and *Green* because, in the two cases, the accused's own statements either tended to or did substantially interlock with the redacted statements of the codefendants.[82]

[78] 3 M.J. 308 (C.M.A. 1977).

[79] 3 M.J. 320 (C.M.A. 1977).

[80] 3 M.J. at 310.

[81] 3 M.J. at 323-24.

[82] 3 M.J. at 313 (Cook, J., dissenting); 3 M.J. at 324 (Cook, J., dissenting).

The military's most recent guidance on the matter of interlocking confessions is found in the 1981 Court of Military Appeals decision of *United States v. Escobedo*.[83] In *Escobedo*, the confessions of the defendants were revealed to the jury by means of redacted versions of the original confessions in the form of stipulations of fact in order to avoid potential *Bruton* problems. The members of the court-martial were instructed on the limited use of the confessions. In the opinion authored by Judge Fletcher, it was pointed out that the interlocking confession exception to *Bruton* might be in conflict with paragraph 140*b* of the Manual for Courts-Martial which was then in effect.[84] Because former paragraph 140*b* and Rule 306 are virtually identical, the observation still holds true. The court, however, ignored paragraph 140*b* and followed the *Parker* pluarlity as to the interlocking confessions. The court saw the statements as "interlocking in the overall plan to sell marihuana."[85] The court's conclusion was that "the stipulated confessions as admitted here with instructions tip the constitutional scales in favor of the premise that the members have followed the military judge's instructions and no violation has occurred to Escobedo's right under the confrontation clause."[86]

Conclusion

Bruton is alive and well in the civilian and military courts with several notable exceptions, the largest of which is the interlocking confessions exception. While many of the federal circuits continue to follow a *Bruton* analysis in regard to interlocking or mutually supportive confessions, the highest military court has abandoned *Bruton* in this area.

The military practitioner should continue to liberally sever courts-martial of codefendants. If this cannot be done, redaction of any code-

[83] 11 M.J. 51 (C.M.A. 1981).

[84] *Id.* at 57 n.4.

[85] *Id.* at 58.

[86] *Id.*

fendant's statement that inculpates another should be fairly and completely accomplished with the participation of opposing counsel, if possible. Before any statement or confession is used at trial, the redacted version should be approved by the military judge in advance of its presentation to the jury. Finally, counsel must insure that the courtmembers are given clear limiting instructions on the use of a codefendant's confession that is introduced into evidence whether it is an interlocking confession or not.

FROM THE DESK OF THE SERGEANT MAJOR

by Sergeant Major John Nolan

1. SKILL QUALIFICATION TEST (SQT)

The Chief of Staff of the Army has approved changes designed to increase flexibility and reduce administration of the Skill Qualification Test (SQT) following separate full-scale review of the program by both the Army and the United States General Accounting Office (GAO). The program had grown to a point where it was becoming difficult to manage in the field. Changes were needed in the system to reduce the workload of administering the performance-based tests after tests had increased from just a handful in 1977 to where SQTs were being fielded for some 600 of the Army's more than 1100 skill levels.

The changes are:

—Hands-on testing will gradually be decentralized and used primarily as a diagnostic tool for commanders. As Soldiers' Manuals are updated, they will contain guidelines for conducting the evaluations.

—Performance-based, written tests will be given annually to soldiers in skill levels one through four. These tests will be used as objective indicators for promotion and other personnel management decisions. They will be given a three-month test period. Test notices will list only a range of tasks to be tested.

—Common tasks will be evaluated by separate test instruments given to all soldiers.

The changes meet both the Army's requirements and the recommendations set forth in the GAO report. The decentralization of hands-on testing will reduce the need for instructional materials, reduce staffing requirements, simplify scoring, and enhance the diagnostic aspects of the program. By use of written tests given in shorter time windows, it will be possible to apply more stringent and equitable rules for the use of SQT scores for personnel management. Additionally, the common-task test program will streamline the testing of those tasks performed by all soldiers including tasks in specialties without a full-scale SQT.

The Army Training Support Center and Army schools will begin incorporating the changes in some of the tests developed for 1983. It is not expected, however, that the changes will be fully implemented in all SQTs until 1984. The Army is firmly convinced of the overall effectiveness of the SQT. Only five percent of the 1900 SQTs fielded since 1977 had to be withdrawn because of suspected invalidation, and, in 1982, only one percent of the tests have been withdrawn, with more than 90 percent of soldiers now passing their SQTs.

2. Enlisted Board Schedule

Listed below are the revised 1982 Enlisted Board schedules:

SGM (E9) Promotion and Retention—8–25 June 1982

Sergeants Major Academy Selection—13–30 July 1982

MSG (E8) Promotion Selection—8–30 Sep 1982

SFC (E7) Promotion Selection—November 1982

SFC (E7) Advanced NCO Course Selection—November 1982

SGM (E9) Standby Selection—December 1982

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. Quota allocations are obtained from local training offices which receive them from the MACOM's. Reservists obtain quotas through their unit or RCPAC if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. TJAGSA CLE Course Schedule

September 1-3: 6th Criminal Law New Developments (5F-F35).

September 13-17: 20th Law of War Workshop (5F-F42).

September 20-24: 68th Senior Officer Legal Orientation (5F-F1).

October 5-8: 1982 Worldwide JAG Conference.

October 13-15: 4th Legal Aspects of Terrorism (5F-F43).

October 18-December 17: 99th Basic Course (5-27-C20).

October 18-21: 5th Claims (5F-F26).

October 25-29: 7th Criminal Trial Advocacy (5F-F32).

November 1-5: 21st Law of War Workshop (5F-F42).

November 2-5: 15th Fiscal Law (5F-F12).

November 15-19: 22d Federal Labor Relations (5F-F22).

November 29-December 3: 11th Legal Assistance (5F-F23).

December 6-17: 94th Contract Attorneys (5F-F10).

January 6-8: Army National Guard Mobilization Planning Workshop.

January 10-14: 1983 Contract Law Symposium (5F-F11).

January 10-14: 4th Administrative Law for Military Installations (Phase I) (5F-F24).

January 17-21: 4th Administrative Law for Military Installations (Phase II) (5F-F24).

January 17-21: 69th Senior Officer Legal Orientation (5F-F1).

January 24-28: 23d Federal Labor Relations (5F-F22).

January 24-April 1: 100th Basic Course (5-27-C20).

February 7-11: 8th Criminal Trial Advocacy (5F-F32).

February 14-18: 22nd Law of War Workshop (5F-F42).

February 28-March 11: 95th Contract Attorneys (5F-F10).

March 14-18: 12th Legal Assistance (5F-F23).

March 21-25: 23d Law of War Workshop (5F-F42).

March 28-30: 1st Advanced Law of War Seminar (5F-F45).

April 6-8: JAG USAR Workshop.

April 11-15: 2nd Claims, Litigation, and Remedies (5F-F13).

April 11–15: 70th Senior Officer Legal Orientation (5F–F1).

April 18–20: 5th Contract Attorneys Workshop (5F–F15).

April 25–29: 13th Staff Judge Advocate (5F–F52).

May 2–6: 5th Administrative Law of Military Installations (Phase I) (5F–F24).

May 9–13: 5th Administrative Law for Military Installations (Phase II) (5F–F24).

May 10–13: 16th Fiscal Law (5F–F12).

May 16–June 3: 26th Military Judge (5F–F33).

May 16–27: 96th Contract Attorneys (5F–F10).

May 16–20: 11th Methods of Instruction.

June 6–10: 71st Senior Officer Legal Orientation (5F–F1).

June 13–17: Claims Training Seminar (U.S. Army Claims Service).

June 20–July 1: JAGSO Team Training.

June 20–July 1: BOAC: Phase II.

July 11–15: 5th Military Lawyer's Assistant (512–71D/20/30).

July 13–15: Chief Legal Clerk Workshop.

July 18–22: 9th Criminal Trial Advocacy (5F–F32).

July 18–29: 97th Contract Attorneys (5F–F10).

July 25–September 30: 101st Basic Course (5–27–C20).

August 1–5: 12th Law Office Management (7A–713A).

August 15–May 19, 1984; 32nd Graduate Course (5–27–C22).

August 22–24: 7th Criminal Law New Developments (5F–F35).

September 12–16: 72nd Senior Officer Legal Orientation (5F–F1).

October 11–14: 1983 Worldwide JAG Conference.

October 17–December 16: 102nd Basic Course (5–27–C20).

3. Civilian Sponsored CLE Courses

November

1–5: SNFRAN, The Skills of Contract Administration, Atlanta, GA.

4: PBI, Workers' Compensation, Pittsburgh, PA.

4–6: VACLE, Advanced Business Law Seminar, Irvington, VA.

5: PBI, Workers' Compensation, Harrisburg, PA.

7–12: NJC, Alcohol and Drugs—Specialty, Reno, NV.

7–19: NJC, Non-Lawyer Judge—General, Reno, NV.

7–19: NJC, Special Court Jurisdiction—General, Reno, NV.

11: VACLE, Family Law, Richmond, VA.

12: VACLE, Family Law, Roanoke, VA.

14–19: NJC, Traffic Court Management—Specialty, Reno, NV.

15–19: SNFRAN, Government Contracts, Washington, DC.

18: VACLE, Family Law, Alexandria, VA.

18–19: ASLM, Medical Determination in Workers' Compensation, Seattle, WA.

19: VACLE, Family Law, Norfolk, VA.

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020.

AAJE: American Academy of Judicial Education, Suite 437, 539 Woodward Building, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151.

ABA: American Bar Association, 1155 E. 60th Street, Chicago, IL 60637.

ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486.

AKBA: Alaska Bar Association, P.O. Box 279, Anchorage, AK 99501.

ALEHU: Advanced Legal Education, Hamline University School of Law, 1536 Hewitt Avenue, St. Paul, MN 55104

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104.

ARKCLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201.

ASLM: American Society of Law and Medicine, 520 Commonwealth Avenue, Boston, MA 02215

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W. (or Box 3717), Washington, DC 20007. Phone: (202) 965-3500.

CALM: Center for Advanced Legal Management, 1767 Morris Avenue, Union, NJ 07083.

CCEB: Continuing Education of the Bar, University of California Extension, 2150 Shattuck Avenue, Berkeley, CA 94704.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DE 19803.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, DC 20006. Phone: (202) 638-0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, DC 20003.

FLB: The Florida Bar, Tallahassee, FL 32304.

FPI: Federal Publications, Inc., Seminar Division Office, Suite 500, 1725 K Street NW, Washington, DC 20006. Phone: (202) 337-7000.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GTULC: Georgetown University Law Center, Washington, DC 20001.

HICLE: Hawaii Institute for Continuing Legal Education, University of Hawaii School of Law, 1400 Lower Campus Road, Honolulu, HI 96822.

HLS: Program of Instruction for Lawyers, Harvard Law School, Cambridge, MA 02138

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

ICM: Institute for Court Management, Suite 210, 1624 Market St., Denver, CO 80202. Phone: (303) 543-3063.

IPT: Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506.

LSBA: Louisiana State Bar Association, 225 Baronne Street, Suite 210, New Orleans, LA 70112.

LSU: Center of Continuing Professional Development, Louisiana State University Law Center, Room 275, Baton Rouge, LA 70803.

MCLNEL: Massachusetts Continuing Legal Education—New England Law Institute, Inc., 133 Federal Street, Boston, MA 02108, and 1387 Main Street, Springfield, MA 01103.

MIC: Management Information Corporation, 140 Barclay Center, Cherry Hill, NJ 08034.

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102.

NCAJ: National Center for Administration of Justice, Consortium of Universities of the Washington Metropolitan Area, 1776 Massachusetts Ave., NW, Washington, DC 20036. Phone: (202) 466-3920.

NCATL: North Carolina Academy of Trial Lawyers, Education Foundation Inc., P.O. Box 767, Raleigh, NC. 27602.

NCCD: National College for Criminal Defense, College of Law, University of Houston, 4800 Calhoun, TX 77004.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.

NCJFCJ: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8978, Reno, NV 89507.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 Sharpe Building, Lincoln, NB 65808.

NCSC: National Center for State Courts, 1660 Lincoln Street, Suite 200, Denver, CO 80203.

NDAA: National District Attorneys Association, 666 North Lake Shore Drive, Suite 1432, Chicago, IL 60611.

NITA: National Institute for Trial Advocacy, William Mitchell College of Law, St. Paul, MN 55104

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89507. Phone: (702) 784-6747.

NLADA: National Legal Aid & Defender Association, 1625 K Street, NW, Eighth Floor, Washington, DC 20006. Phone: (202) 452-0620.

NPI: National Practice Institute Continuing Legal Education, 861 West Butler Square, 100 North 6th Street, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338-1977).

NPLTC: National Public Law Training Center, 2000 P. Street, N.W., Suite 600, Washington, D.C. 20036

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 12207.

NYULS: New York University School of Law, 40 Washington Sq. S., New York, NY 10012

NYULT: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036.

OLCI: Ohio Legal Center Institute, 33 West 11th Avenue, Columbus, OH 43201.

PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700.

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080.

SMU: Continuing Legal Education, School of Law, Southern Methodist University, Dallas, TX 75275

SNFRAN: University of San Francisco, School of Law, Fulton at Parker Avenues, San Francisco, CA 94117.

TUCLE: Tulane Law School, Joseph Merrick Jones Hall, Tulane University, New Orleans, LA 70118

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124.

UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.

VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and The Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

Current Materials of Interest

1. Regulations, Pamphlets, etc.

Number	*Title*	*Change*	*Date*
AR 630-10	Personnel Absences; Absence Without Leave Desertion	I02	18 Jun 82
DA Pam 27-7	Military Justice Handbook Guide for Summary Court-Martial Trial Procedure		15 May 82
DA Pam 27-154	Nonappropriated Funds: Small Purchases		1 Jul 82
DA Pam 310-1	Consolidated Index of Army Publications and Blank Forms		1 Apr 82

(DA Pam 310-1 is a complete revision of and supersedes DA Pam 310-1 (1 Dec 81); 310-2 (15 Dec 81); 310-3 (1 Jan 82); and 310-4 (15 Jan 82). This and future issues will be published only on microfiche.

DA Pam 608-4	A Guide for the Survivors of Deceased Army Members	1	1 Jul 82

2. Articles.

Pratt, *A Judicial Perspective on Opinion Evidence Under the Federal Rules*, 39 Wash. & Lee L. Rev. 313 (1982).

Fourth Circuit Review, *Double Jeopardy: Standard for Reprosecution After Mistrial on Defendant's Motion*, 39 Wash. & Lee L. Rev. 581 (1982).

By Order of the Secretary of the Army:

E. C. MEYER
General, United States Army
Chief of Staff

Official:

ROBERT M. JOYCE
Brigadier General, United States Army
The Adjutant General

☆U.S. GOVERNMENT PRINTING OFFICE: 1982: 361-809/113